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No. 83-473

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCIS X. OROFINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of a continuance to afford petitioner's attorney additional preparation time deprived petitioner of the effective assistance of counsel.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-4a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on July 21, 1983 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on September 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of the sale of unregistered securities, in violation of 15 U.S.C. 77e and 77x; three counts of inducing investors to travel in interstate commerce in execution of a scheme to defraud, in violation of 18 U.S.C. 2314; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent five-year terms of imprisonment on each count and five years' probation to commence upon termination of his incarceration. Petitioner also was fined $73,000. The court of appeals affirmed (Pet. App. 1a-4a).

1. The evidence at trial showed that petitioner and four co-defendants, Norman Forsyth, L. Henry Sarmiento, David Heenan, and Stanley Wiklinski, fraudulently sold to the investing public over $400,000 worth of promissory notes of Vitorio Widemann International, Inc. (VWI), that were convertible into the stock of VWI's parent, Tellco Information Services, Inc. (Tellco), a company controlled by petitioner and Forsyth.[1] To induce potential investors to pur-

[1] Forsyth, Sarmiento, Heenan, and Wiklinski were indicted along with petitioner. Following entry of a guilty plea, Forsyth was sentenced to concurrent terms of five years' imprisonment and five years' probation; Sarmiento was sentenced to concurrent three-year terms with all but six months suspended, to be followed by two and one-half years' probation; Heenan was sentenced to concurrent two-year terms with all but four months suspended, to be followed by two years' probation. Charges against Wiklinski were dismissed on the government's motion.

chase the VWI notes, petitioner and his confederates told them of Tellco's acquisition of a large cotton mill, Cotonificio Vitorio Widemann, located near Turin, Italy; portrayed Tellco as a successful venture in which both the Rockefeller family and the Rolling Stones had invested; promised a three-dollar return on every dollar invested; and promised investors that they could obtain the return of their investments at any time. Tr. 74-75, 187-189, 314-315, 330-332. However, petitioner and his confederates failed to inform the investors that Cotonificio had a severe cash flow problem and that during the summer of 1977 the factory was forced to close because it could not pay for the raw cotton it needed to operate (Tr. 170-174). In many instances, they also failed to mention that the VWI notes were convertible into restricted, not common, Tellco stock and therefore were not readily marketable. And, despite their representations, they did not return investors' money when requested to do so (Tr. 81, 107-108). Through such fraudulent representations and omissions, they induced 40 people to invest in excess of $400,000 in the venture; all of the money was lost[2] and some of it was misappropriated by petitioner (Tr. 345).[3]

Petitioner and his co-defendants also attempted to defraud several major cotton suppliers of large quantities of cotton. For example, after inducing one dealer to ship 1200 bales of cotton for Cotonificio to

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[2] For example, a Roman Catholic priest lost a $100,000 fund entrusted to his care to found a religious order devoted to aiding the poor (Tr. 325). Others invested and lost their life savings as the result of the fraud (Tr. 65, 212).

[3] The government presented evidence showing that part of the investment fund was used to pay petitioner's rent at an exclusive apartment (Tr. 343-345, 347-351).

Genoa, Italy, they attempted to obtain its release from the dock without payment. When this proved unsuccessful, Forsyth paid $30,000 and offered a performance bond for the remainder of the amount due. After a mailgram was transmitted stating that the bond was on its way, petitioner requested immediate release of the cotton. The cotton dealer elected to await the arrival of the bond itself. The bond never arrived, and, upon inquiry, the dealer learned that it never had been issued by the insurance company. Tr. 6-10, 23-27.

2. At his arraignment on July 22, 1982, petitioner was represented by an attorney who previously had represented him in a criminal matter and who was representing him in a parallel civil enforcement proceeding involving Tellco brought by the Securities and Exchange Commission. The attorney's notice of appearance specified that the appearance was "for arraignment only." At that time, the trial date was set for September 30, 1982 (Affidavit of Assistant United States Attorney Pamela Rogers Chepiga, Oct. 14, 1982, at 1-2).

On July 29, 1982, petitioner appeared before a federal magistrate and sought appointment of counsel pursuant to the Criminal Justice Act (CJA), 18 U.S.C. 3006A. Petitioner stated in an affidavit that his annual income was $48,000 and that he had $3,000 in savings. The magistrate granted the application for appointment of counsel, but noted that he was unsure whether petitioner qualified for assistance under the CJA and that further consideration of the application was necessary. After two attorneys declined to accept appointment due to other commitments, the district court requested that the CJA attorney on duty that day appear at an August 6 pretrial conference. During the conference, in which

petitioner did not participate, the court found that petitioner's income did not qualify him for CJA representation, dismissed the CJA attorney, and rescheduled the trial for October 18, 1982. On August 9, the district court informed petitioner of the denial of his CJA application and of the new trial date, instructed him to retain an attorney within 10 days, and stated that his attorney should contact the Assistant United States Attorney to obtain access to documents (C.A. App. 35A-36A).

Two days later, an attorney informed the district court that he was planning to represent petitioner as retained counsel. However, during a hearing on September 8, 1982, the attorney stated that he would not be representing petitioner, apparently because of petitioner's failure to pay a retainer (C.A. App. 121A-122A, 127A). The court then reiterated its intent to begin the trial on October 18, impressed upon petitioner the importance of retaining counsel and avoiding further delay, and told him that, if he failed to do so, he would be expected to proceed pro se (C.A. App. 123A-128A).

During a conference on September 21, 1982, petitioner informed the district court that he had made arrangements to retain counsel and acknowledged that he understood that October 18 was the trial date (C.A. App. 145A). The court observed that petitioner had substantial time to obtain a lawyer and again directed him to proceed pro se unless he could find a lawyer willing to proceed on that date (C.A. App. 147A).[4]

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[4] Petitioner was an attorney who previously had resigned from the bar in the face of disciplinary proceedings (Chepiga Aff. 4).

On September 30, 1982, Charles Weintraub filed a notice of appearance on behalf of petitioner. During the three weeks preceding the trial, Weintraub reviewed discovery documents at the prosecutor's office, conferred with government counsel, and filed numerous motions, including motions to dismiss various counts, a motion to suppress tape recordings, and a motion for a continuance on the basis of insufficient preparation and petitioner's allegedly poor health (C.A. App. 155A-169A). Weintraub also took the deposition of several witnesses at the United States Consulate in Milan, Italy (Pet. 6). The government furnished assistance in connection with these depositions by arranging for space, equipment, and interpreters and other personnel.

On October 15, the district court held a hearing on petitioner's pretrial motions. It denied the motion for a continuance, observing that petitioner had been "playing fast and loose" with the court and that the trial would take no more than three or four days (C.A. App. 179A-188A). Trial began as scheduled on October 18 and consumed three days. The government's evidence consisted principally of the testimony of defrauded investors who testified about petitioner's representations to them (Tr. 55-84, 99-108, 171-178, 185-188, 218-222, 238-242, 246-258, 263-270, 313-329). The defense consisted of the testimony of an expert witness that certain notes issued to an investor were not signed by petitioner, although they bore what appeared to be his signature (Tr. 357-362).

3. On appeal, petitioner argued, inter alia, that he was denied due process and the effective assistance of counsel because of the district court's denial of his motion for a continuance. The court of appeals rejected this claim. It observed that "given the brief

duration of the trial, the straight-forward nature of the Government's proof, and the relative insignificance of the incidents of prejudice alleged by [petitioner], the trial court did not abuse its discretion in denying * * * [the] application" (Pet. App. 2a).

ARGUMENT

Petitioner contends (Pet. 9-22) that he received ineffective assistance of counsel as a result of the district court's denial of his request for a continuance to allow counsel additional time to prepare for trial. The court of appeals correctly rejected this fact-bound claim, finding no abuse of discretion in the circumstances of this case. Further review therefore is not warranted.

1. As Justice Black observed for a unanimous Court in *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), "[s]ince the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel." To the contrary, the Court has recently reiterated the established principle that trial courts have "broad discretion" in granting or denying a request for a continuance. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9-10. See also *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). No abuse of discretion has been shown here. Petitioner was informed by the district court on August 9, 1982 that his trial was scheduled for October 18, 1982 and that because his annual income disqualified him from receiving assistance under the Criminal Justice Act, he must make arrangements to retain counsel to represent him at trial on that date. The district court again stressed to

petitioner on September 8, 1982 the importance of retaining counsel without further delay. On September 21, 1982, petitioner informed the court that he had "made arrangements" to retain counsel (C.A. App. 145). On September 28, 1982, petitioner retained Charles Weintraub to represent him, and on September 30, Weintraub filed a notice of appearance on behalf of petitioner (Pet. 6). Thus, as petitioner acknowledges (Pet. 6), counsel had 21 days to prepare for trial, a period that was ample in this case, which the court of appeals characterized as "straightforward" (Pet. App. 2a). Nor can petitioner entirely avoid responsibility for his delay of a month and a half in retaining counsel, which substantially contributed to whatever time limitations counsel might have experienced in preparing for trial. See *Ungar* v. *Sarafite*, 376 U.S. at 590.

This is not a case, then, in which counsel was forced by the court to enter the case at such a late date that the appointment of counsel was a sham because counsel was effectively "precluded" from preparing the case and therefore must be conclusively presumed to have rendered ineffective assistance. See *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (right to counsel denied where counsel appointed on day of trial). Compare *Avery* v. *Alabama*, *supra* (right to counsel not denied where trial in capital case was held three days after arraignment and appointment of counsel, despite counsel's request for a continuance based on inadequate time to prepare). Where, as here, counsel has been afforded a period of time to prepare for trial of sufficient length that the assignment of counsel cannot be said to be a sham or mere formality, the Court has explicitly declined "to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel" without some showing of

prejudice. *Chambers* v. *Maroney*, 399 U.S. 42, 54 (1970). See also *Morris* v. *Slappy*, slip op. 10; *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972); *Avery* v. *Alabama*, 308 U.S. at 450, 452. Petitioner's contention (Pet. 9-11) that his conviction should be reversed without a showing of prejudice therefore is mistaken. See generally U.S. Br. at 27-28, 30-37, *United States* v. *Cronic*, cert. granted, No. 82-660 (Feb. 22, 1983).[5]

2. Petitioner also contends (Pet. 11-22) that, even if some showing of prejudice is required, the Court should grant certiorari in this case to resolve a conflict in the circuits regarding the nature of the showing of prejudice that is required. The Court already has granted certiorari in *Strickland* v. *Washington*, No. 82-1554 (June 6, 1983), to address that question, and there is no reason for the Court to grant certiorari here as well. This case would not be an ap-

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[5] In *Cronic*, the Tenth Circuit reversed the conviction without finding specific derelictions by counsel that allegedly resulted from inadequate preparation. *United States* v. *Cronic*, 675 F.2d 1126 (1982). As we explain in our brief in *Cronic* (at 44-47), the Tenth Circuit's dispensing with a requirement that prejudice be shown was erroneous and constituted a departure from prior Tenth Circuit precedent involving the denial of a continuance, in which that court has required a showing of a "clear abuse of discretion resulting in manifest injustice." *United States* v. *Gonzales-Palma*, 645 F.2d 844 (10th Cir.), cert. denied, 454 U.S. 861 (1981). Nor, contrary to petitioner's suggestion (Pet. 10 n.9), is there any need to hold this case pending a decision in *Cronic*. In this case, there is no allegation that counsel was inexperienced—a factor upon which the Tenth Circuit placed substantial reliance in *Cronic*. 675 F.2d at 1128, 1129. Moreover, here, unlike in *Cronic*, petitioner himself was largely responsible for the amount of time counsel had to prepare for trial because he did not retain counsel for a month and a half after the district court informed him that he must do so and that the October 18 trial date was firm.

propriate vehicle for consideration of that question in any event. Petitioner did not present his claim of ineffective assistance of counsel to the district court in a motion for a new trial or for relief under 28 U.S.C. 2255. For this reason, there have been no findings by the district court with respect to what functions counsel actually did not have time to perform prior to trial,[6] the significance of any such omissions, or the prejudice, if any, that might have resulted from counsel's allegedly inadequate preparation time.[7] All the Court has before it are petitioner's bare assertions regarding evidence that would have been developed with more preparation time (see Pet. 21 n.11), without any assessment of the significance of the evidence or proof that it in fact was not produced because of the limited time available for preparation.

Moreover, the facts petitioner now asserts (see Pet. 21 n.11) would have been proven at trial if he had more preparation time were not presented to the court below until petitioner filed his rehearing petition (see Pet. for Reh. 13-14), and even then they were not offered in support of petitioner's contention

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[6] For example, although petitioner refers (Pet. 6-7) to 5,000 pages of SEC transcripts, 5,000 pages of materials furnished by the government (which petitioner states (Pet. 7 n.5) overlap to an unspecified extent), and other materials (records, telexes, financial statements, etc.), he does not identify which of those materials counsel was unable to read and digest. Nor does he explain their significance to the case. Presumably, counsel concentrated his efforts on the most important issues in preparing for trial.

[7] Thus, although petitioner discusses (Pet. 6-7) the time counsel devoted to preparing for two witnesses who ultimately were not called by the government, it is difficult to see how petitioner could have been prejudiced by the government's failure to call the witnesses.

that the denial of a continuance deprived him of effective assistance of counsel (see Pet. for Reh. 6-11). They were mentioned in support of a distinct claim that petitioner had been denied his rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). See Pet. for Reh. 11-15. Petitioner there identified these facts as information that counsel learned a co-defendant had told the prosecution and that petitioner contended should have been disclosed to him under *Brady*. Petitioner did not contend that he would have learned of those facts independently if counsel had had more time to prepare for trial. And because most of these assertions—to the effect that co-defendant Forsyth rather than petitioner ran Tellco and that petitioner sought in good faith to obtain cotton for the mill—to the extent they were true, undoubtedly were for the most part known to petitioner himself, they were not undiscoverable by counsel because of assertedly inadequate preparation time.[8]

3. Petitioner also presents (Pet. i, 21-23) the question of what should be the minimum standard of com-

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[8] We note that the government's theory of prosecution was based upon the sale by petitioner of promissory notes of a Tellco subsidiary through false statements and omissions of crucial facts concerning the condition of the cotton-manufacturing operation that formed the basis of the investment. It was irrelevant to the government's case who actually managed Tellco or whether, at some point, petitioner sought to improve its financial condition for the purchase of cotton. Because such matters are therefore of little exculpatory value in this case and because the court of appeals found petitioner's assertions of prejudice to be relatively insignificant in any event (Pet. App. 2a), there is no occasion to hold the petition in this case pending a decision in *Strickland* v. *Washington*, *supra*, which presents the question of the nature of the showing of prejudice that is required in an ineffective assistance of counsel case that does not involve the denial of a request for a continuance.

petence required of defense counsel, noting that the Second Circuit uses the "farce and mockery" test while other circuits have developed different formulations. However, as petitioner concedes (Pet. 23), the court of appeals did not address this question, no doubt because petitioner did not raise it in the court of appeals. Petitioner's contentions regarding his right to counsel were not that counsel was incompetent or committed serious derelictions in his own right [9]—the situation in which the minimum standard of competence required of defense counsel is relevant. He argued only that external restraints resulting from the denial of a continuance prevented counsel from rendering the adequate assistance that otherwise would have been furnished. This case therefore simply does not raise the standard-of-competence issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1983

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[9] Petitioner was represented in the court of appeals and is represented before this Court by the attorney who represented him at trial. That attorney would not be likely to—and ethically could not—attack his own performance in these circumstances.

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